Chapter 5:
Administrative and Judicial Review

A. Administrative Review

If an agency is subject to the "contested case" provisions of the Administrative Procedure Act ("APA"), Title 10, Subtitle 2 of the State Government Article, the agency must provide the PIA applicant with the opportunity for an administrative review in accordance with contested case hearing procedures. The PIA requires that any applicant requesting an APA hearing be given one, despite the fact that it often makes little sense to have such a hearing. Adjudicatory hearings of this type are most appropriate for factual disputes, whereas the issue in a PIA denial is usually one of law (*e.g.* the scope of a statutory exception) that the agency should have fully considered prior to the denial. Nevertheless, the PIA is explicit, and denial letters from agencies subject to APA contested case provisions should indicate this procedure as an available remedy for review.

By the express terms of GP § 4-361(c), however, the applicant does not have to exhaust administrative remedies under the APA before seeking judicial review under GP § 4-362. Similarly, a prisoner need not exhaust administrative remedies under the Prisoner Litigation Act before filing a civil action in circuit court in connection with a PIA request relating to conditions of confinement. *Massey v. Galley*, 392 Md. 634 (2006).

B. Judicial Enforcement

The PIA provides for judicial enforcement of the rights provided under the Act. GP § 4-362. It authorizes a suit in the circuit court to "enjoin" an entity, official, or employee from withholding records and order the production of records improperly withheld. Under a 2014 amendment to this provision, the right to judicial review now expressly includes the right to challenge an agency's refusal to provide copies of responsive records. *See* 2014 Md. Laws, ch. 584.

1. Limitations

The Court of Special Appeals has held that actions for judicial review under GP § 4-362 of the PIA are controlled by § 5-110 of the Courts and Judicial Proceedings Article, which has a two-year limitations period, rather than by what is now Rule 7-203, which would require the action to be brought within 30 days. The Court did not decide whether proceedings under what is now GP § 4-362 are subject to any other rules governing administrative appeals. *Kline v. Fuller*, 56 Md. App. 294 (1983). Given that a requester may make a new PIA request after a period of limitations has expired concerning the denial of a prior request, the Court of Special Appeals has characterized the two-year limitations period as of "minuscule significance." *Blythe v. State*, 161 Md. App. 492, 512 (2005).

2. Procedural Issues

- **Venue.** Venue is proper where the complainant resides or has a principal place of business or where the records are located. GP § 4-362(a); s*ee Attorney Grievance Commission v. A.S. Abell*, 294 Md. 680 (1982).

- **Answer.** The defendant must answer or otherwise plead within 30 days after service, unless the time period is expanded for good cause shown. GP § 4-362(b)(i).

- **Expedited hearing.** GP § 4-362(c) provides for expedited court proceedings in PIA cases. The agency and counsel should cooperate if the plaintiff seeks a quick judicial determination.

- **Intervention.** In some cases, it may be appropriate for a third party to intervene in an action for disclosure. For example, if the issue is the release of investigatory, financial, or similar records, the person who is the subject of the records may wish to intervene under Maryland Rule 2-214. In an appropriate case, particularly one involving confidential business records, the agency should consider inviting affected persons to intervene. In that event, an affected person's failure to seek intervention may itself be an indication that the records are not truly confidential.

3. Agency Burden

The burden is on the entity or official withholding a record to sustain its action. GP § 4-362(b)(2). If the custodian invokes the agency memoranda exception, however, and the trial court determines that one of the privileges embraced within that exemption applies, the custodian will have met the burden of showing that disclosure would be contrary to the public interest. *Cranford v. Montgomery County*, 300 Md. 759, 776 (1984). The PIA specifically provides that the defendant custodian may submit a memorandum to the court justifying the denial. GP § 4-362(b)(2)(ii). *Cranford* discusses the level of detail necessary to support a denial of access.

To satisfy the statutory burden, an entity or official withholding a record must put forth evidence sufficient to justify the decision. In some circumstances, a court may require the agency to file a *Vaughn* index (named after *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973)) detailing each record withheld or redacted by author, date, and recipient, stating the particular exemption claimed, and providing enough information about the subject matter to permit the requester and court to test the justification of the withholding. *See Blythe v. State*, 161 Md. App. 492, 521 (2005).

A regulatory agency that denies a person in interest access to an investigatory file under GP § 4-351 must establish first, that the file was compiled for a law enforcement purpose and, second, that disclosure would have one of the effects under GP § 4-351(b). *Fioretti v. State Board of Dental Examiners*, 351 Md. 66 (1998) (holding in plaintiff's favor because the agency failed to support its motion to dismiss with affidavits, a summary of the file, or other relevant evidence).

In contrast, a law enforcement agency enumerated under GP § 4-351(a)(1) is presumed to have compiled an investigatory file for law enforcement purposes. *Blythe v. State*, 161 Md. App. 492, 525-26 n.6 (2005). Because a generic determination of interference with a pending investigation can be made, a "*Vaughn* index" listing each document, its author, date, and general subject matter, and the basis for withholding the document, is not required. *See Office of the State Prosecutor v. Judicial Watch, Inc.*, 356 Md. 118 (1999). However, the custodian nevertheless bears the burden of "demonstrating, with particularity and not in purely conclusory terms, precisely why the disclosure [of an investigatory record] 'would be contrary to the

public interest'" and exploring the feasibility of severing a record "into disclosable and non-disclosable parts." *Blythe v. State*, 161 Md. App. 492, 527 (2005).

The court may examine the questioned records *in camera* to determine whether an exception applies. GP § 4-362(c)(2); *see Equitable Trust Co. v. State Comm'n on Human Relations*, 42 Md. App. 53 (1979), *rev'd on other grounds*, 287 Md. 80 (1980). GP § 4-362(c)(2) is discretionary, not mandatory. Whether an *in camera* inspection will be made ultimately depends on whether the trial judge believes that it is needed for a responsible determination on claims of exemption. *Cranford v. Montgomery County*, 300 Md. 759, 779 (1984); *see also Zaal v. State*, 326 Md. 54 (1992) (discussing alternative approaches to protecting sensitive records).